RECENT DECISIONS.

AGENCY—TERMINATION—CONSTRUCTIVE NOTICE BY RECORDING DEED. The defendant appointed an agent to sell certain land. The defendant himself then sold the land, his vendee recording the deed as provided by statute. Later the agent made a contract of sale with the plaintiff, both being ignorant of the previous sale by the defendant. *Held*, under Sayle's Civ. Stat. Art. 4652, which provides that "the record of any deed * * * shall be taken and held as notice to all persons of the existence of such deed," the agency had been terminated by such constructive notice. *Donnan* v. *Adams* (Tex. 1902) 71 S. W. 580.

This is a harsh construction. The aim of such statutes would appear to be the protection of equitable interests against purchases for value without notice, and of purchasers for value without notice against unrecorded legal interests. To give them the effect of protecting a party who knows all the facts at the expense of one innocently dealing with his agent seems unwarranted. No authority has been found in support of the proposition.

BANKRUPTCY—EXEMPTION—ASSIGNMENT. Defendant assigned a judgment to a trustee for the benefit of firm creditors. He then put the judgment into the hands of an attorney to collect and it was collected. Proceedings in involuntary bankruptcy were instituted against the defendant on account of this transaction, and the money was paid by the attorney to the trustee in bankruptcy. *Held*, the defendant had not by this assignment waived his right to an exemption out of the money recovered on the judgment. *Bashinsky* v. *Talbot* (C. C. A., 5th Circ. 1902) 119 Fed. 337.

The general rule in the State courts seems to be that an assignment for the benefit of creditors is a waiver of the exemption as to the property assigned. *Carrol* v. *Else* (1892) 75 Md. 301; *Graves* v. *Hinkle* (1889) 120 Ind. 157. The federal courts are bound by the State decisions on these questions, but show a tendency to construe the State exemption laws very liberally in favor of the bankrupt. *In re Tollet* (1901) 106 Fed. 866; *In re Falconer* (1901) 110 Fed. 111.

CARRIERS—CONSTITUTIONAL LAW—DUE PROCESS. Defendant carrier was sued for the loss of goods under a statute declaring that when freight is shipped over lines of connecting carriers under a contract relieving carriers of liability beyond their own lines, any connecting carrier shall be liable, nevertheless, unless, within thirty days after demand, he informs the shipper or his assigns in writing "when, where, and by which carriers said freight was damaged or lost," with names of necessary witnesses. *Held*, the statute was not unconstitutional as depriving of property without due process of law. *Central of Ga. R. Co.* v. *Murphey* (Ga. 1903) 43 S. E. 265.

A statute declaring that any contract releasing a common carrier from its absolute liability should be void, has been held constitutional. *McDaniel* v. *Chicago, etc. R. Co.* (1868) 24 Ia. 412. Nor was the constitutionality of a statute declaring that connecting carriers shall be liable as common carriers over the whole route, without possibility of limitation, questioned on this ground. *Miller G. & E. Co.* v. *Union Pac. R. Co.* (1897) 138 Mo. 658. The carrier is held in Georgia to undertake transportation over the entire route, *Falvey* v. *The Georgia Railroad* (1886) 76 Ga. 597, though it may limit its liability to its own line by special contract. *Central R. & Banking Co.* v. *Avant* (1887) 80 Ga. 195. If the above statutes are unobjectionable, it would seem constitutional to make this power of limitation subject to conditions, even should these be impossible of performance.

CONSTITUTIONAL LAW—CHANGE OF DECISION—LAW IMPAIRING OBLIGATION OF CONTRACT. The plaintiff bought the bonds of an improvement district, which bonds were issued under a statute held by the Supreme Court of Ohio at the time of the purchase to be valid. Thereafter the statute under the authority of which the bonds were issued was declared to be unconstitutional by the same court. *Held*, the right of the plaintiff was not affected by the change of decision, but was governed by the law as declared at the time of the purchase. *Board of Commissioners* v. *Gardner Savings Institute* (C. C. A., 6th Circ. 1902) 119 Fed. 36.

The plaintiff brought an action of ejectment for lands below high-water mark on a tidal river and recovered from the defendant in the State court. The defendant claimed that according to the law of Alabama at the time he purchased the land, he owned the land between high and low water marks, and that a change of decision by the supreme court of the State impaired the obligation of a contract. *Held*, even if there had been a change of decision, no case was presented under the contract clause of the Constitution. *Mobile Transportation Company* v. *Mobile* (1903) 23 Sup. Ct. Rep. 170. See NOTES, p. 272.

CONSTITUTIONAL LAW—POLICE POWERS—FOURTEENTH AMENDMENT.—A statute made it a misdemeanor in cities of the first and second class to offer for sale any real property without the written authority of the owner. *Held*, the statute was unconstitutional as depriving the plaintiff of liberty without due process of law. *Grossman* v. *Caminez* (1903) 79 N. Y. Supp. 900.

Interference with individual liberty by the legislature may be justifiable under its powers "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier* v. *Connolly* (1885) 113 U. S. 27, 31. But every such exercise of the police power "must be reasonable * * * and in determining the question of reasonableness, the court is at liberty to act with reference to the established usages, customs and traditions of the people." *Plessy* v. *Ferguson* (1895) 163 U. S. 537, 550. The purpose of an act is relevant to the inquiry whether it is a proper exercise of the police power. *People* v *Mark* (1885) 99 N. Y. 377; *People* v. *Arensberg* (1887) 105 N. Y. 123. The court is therefore empowered to determine in a given case whether the interest of the public may require the legislation.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JUDICIAL ACTS. N. Y. Laws, 1892, c. 493, provides that upon petition by twelve or more freeholders of any county, the Supreme Court or the county court of that county, if satisfied that the highway petitioned for is necessary, may order the publication of a notice of the time and place when an application for commissioners to build such highway shall be made, and at such time may appoint such commissioners. The plaintiff was a holder in due course of municipal bonds issued for the construction of a road thereunder. *Held*, the provision is not unconstitutional as conferring non-judicial powers upon the court. *Citizen's Sav. Bank* v. *Town of Greenburgh* (1903) 173 N. Y. 215.

The dissenting opinion of PARKER, C. J., in which VANN and WERNER, J J., concur, vigorously defends a strict construction of the separation of the three departments of government. *Hayburn's Case* (1792) 2 Dall. 409 note, approved in *United States* v. *Todd* (1794) 13 How. 52 note, shows how early the American judiciary became alert on this question. But the New York courts, not unwisely it would seem, have always given liberal support to such statutes. The appointment of officers can there be delegated to the judiciary. *Sweet* v. *Hubert* (1868) 51 Barb. 312. So the court may be empowered to order the erection of railroad gates upon the application of local authorities, the determination of the necessity for an act being a judicial question. *People* v. *Long Island Ry. Co.* (1892) 134 N. Y. 506. The decision at issue is a logical deduction from these authorities.

CONTRACTS—PUBLIC POLICY—CONGRESSIONAL INVESTIGATION. The plaintiff was prosecuting witness before a Congressional committee investigating the affairs of the "Whiskey Trust." He agreed with the defendants to promote the investigation and furnish the defendants with information as to facts brought out against the corporation, so that the defendants might take advantage of the stock market, in consideration of their sharing the profits with him. *Held*, the agreement was void as against public policy. *Veazey* v. *Allen* (1903) 173 N. Y. 359.

Although there seems to be no authority directly in point, many cases involve the same principle. *Mills* v. *Mills* (1869) 40 N. Y. 543, was an agreement to use influence to have a law passed. The court said, "It is not necessary to adjudge that the parties stipulated for corrupt action or that they intended it;" "it is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action." *Tool Co.* v. *Morris* (1864) 2 Wall. 45; *Maguire* v. *Corwine* (1879) 101 U. S. 108. These cases must be carefully distinguished from those where the contracting parties are principal and agent merely. No rule of public policy prevents a man from petitioning a legislative body in any lawful manner through his servants. *Sedgwick* v. *Stanton* (1856) 14 N. Y. 289; *Russell* v. *Burton* (1867) 66 Barb. 539. But the contract must go no further. *Cheeseborough* v. *Conover* (1893) 140 N. Y. 382.

CONTRACTS—WAREHOUSE RECEIPT - ACCEPTANCE OF TERMS. The plaintiff delivered goods to the defendant warehouseman under a parol contract, but several days after received a receipt varying the terms of the previous agreement. He retained this unread. *Held*, the plaintiff could recover on the parol contract unless he had understood and assented to the contract set forth in the receipt. Mere retention of the receipt was not conclusive evidence of this assent. *Windell* v. *Readman Warehouse Co.* (Wash. 1902) 71 Pac. 56.

The principles governing a bill of lading under these circumstances would seem to apply to a warehouse receipt. The acceptance of the former by the shipper is ordinarily conclusive evidence of his assent to its terms, *Snow* v. *Indiana, etc., R. Co.* (1886) 109 Ind. 422; but if the goods are delivered under a valid parol contract assent to a new contract cannot be presumed from the mere retention of a receipt unread. The shipper has the right to assume, in the absence of notice, that if it describes the terms of any contract it will be those of the contract under which the goods were delivered. *Strohn* v. *Detroit R. R. Co.* (1867) 21 Wis. 584; *Mo. Pac. R. R. Co.* v. *Beeson* (1883) 30 Kan. 298. In New York assent of the shipper is presumed if the bill of lading is delivered in time for him to reclaim the goods, but not if delivered after the actual transit begins. *Germania Fire Ins. Co.* v. *M. & C. R. R. Co.* (1878) 72 N. Y. 90; *Swift* v. *Pacific Mail Steamship Co.* (1887) 106 N. Y. 206.

CORPORATIONS—POWER TO SUBSCRIBE TO STOCK—MUTUAL CONTROL. The directors and the holders of the majority of the stock of an insurance company made an arrangement with the directors of a trust company, under which a majority of the stock of the former was to be transferred to the latter. The trust company was then to double its capital and issue the new shares to the insurance company, which, having already some shares of the old stock, would thus get a controlling interest in a corporation by which it would be itself controlled. *Held*, dissenting stockholders of the insurance company could have their directors enjoined from carrying out the scheme. *Robotham* v. *Prudential Ins. Co.* (N. J. 1903) 53 Atl. 842. See NOTES, p. 275.

CRIMINAL LAW—ARMY OFFICERS—JURISDICTION OF CIVIL COURTS. An officer of the U. S. army committed a forgery while at a military post. After his discharge from the army he was tried in a civil court. *Held*, the civil court had jurisdiction, although Congress had given jurisdiction over offenses committed by members of the army to the military authorities. *Neall* v. *U. S.* (C. C. A., 9th Circ. 1902) 118 Fed. 699.

Following *U. S.* v. *Clark* (1887) 31 Fed. 710, which represents the uniform authority in the U. S. (see *Steiner's Case*, 6 Op. Att'ys Genl. 413) the court holds that unless the statute confers jurisdiction in such cases upon the courts martial exclusively, their jurisdiction will be concurrent with that of the civil courts. "The intention to divest civil courts of their regular jurisdiction will not be ascribed to Congress in the absence of clear and direct language to that effect, in view of the 'known hostility of the American people to any interference by the military with the regular administration of justice by civil courts.' *Coleman* v. *Tennessee* (1877) 97 U. S. 509, 514." The court refused to consider the question of conflict of jurisdiction, where a court martial had asserted itself in any way (upon this point see *U. S.* v. *Cashill* (1863) 1 Hughes, 552), as the military authorities had not acted in this case.

CRIMINAL LAW—EXTRADITION—FUGITIVE FROM JUSTICE. The relator in *habeas corpus* was held under an extradition warrant of the governor of New York, issued on the requisition of the governor of Tennessee. It was admitted that he had not been actually present in the demanding State on the date stated in the indictment. *Held*, mere constructive presence in the demanding State at the time of the alleged commission of the crime was not sufficient to render him a fugitive from justice, and extraditable. *State of New York* v. *Hyatt* (1902) 187 U. S. affirming 172 N. Y. 166.

This is a final settlement of a constitutional question arising upon the construction of Art. IV. Sec. 2. The decision confirms the position which the State courts have taken. See 3 COLUMBIA LAW REVIEW, 60.

EMINENT DOMAIN—PUBLIC USE. Plaintiff's charter authorized it to erect a dam for the purpose of generating power and transmitting it for its own use or that of other individuals and corporations, and in order to construct such works and railroads and telephone lines, invested it with the power of eminent domain and all powers of internal improvement companies. *Held*, as the purposes for which the right of eminent domain was conferred were vague and were not shown to be public, and as the public would have no definite right to use the property condemned, the grant of the power of eminent domain was unconstitutional. *Fallsburg Power & Mfg. Co.* v. *Alexander* (Va. 1903) 43 S. E. 194.

Though "public use" has sometimes been interpreted as equivalent to "public advantage"—*Talbot* v. *Hudson* (1860) 16 Gray 417; *Hand Gold Mining Co.* v. *Parker* (1877) 59 Ga. 419—a more reasonable and enforceable interpretation of the constitutional restriction regards "public use," as meaning use by the public, and allows the operation of eminent domain only when the public would acquire a legal right to enjoy the property for some purpose. *Memphis Freight Co.* v. *Memphis* (Tenn. 1867) 4 Cold. 419; *Matter of Eureka Basin Co.* (1884) 96 N. Y. 42; Lewis on Eminent Domain, §§ 164, 165. Even if the power of eminent domain could have been granted for some of the purposes expressed in the charter, the combination of public and private purposes would have rendered the whole grant void. *Sadler* v. *Langham* (1859) 34 Ala. 311, 333.

EQUITY—SPECIFIC PERFORMANCE—NEGATIVE COVENANT. By a contract extending over a period of ten years with privilege in the vendee of extension for a like period, the defendant agreed to deliver to the plaintiff each year a designated quantity of pulp wood from certain premises, payments to be made annually. The contract contained a covenant by the vendor not to sell the said premises and also contemplated the contingencies of a destruction of the timber by fire and a taking of the land by eminent domain. *Held*, in a bill to enjoin breach of the negative covenant and compel specific performance of the contract, it was impossible in a legal action accurately to compute damages, and plaintiff was entitled to an equitable remedy. *St. Regis Paper Co.* v. *Santa Clara Lumber Co.* (1903) 173 N. Y. 149.

In *Taylor* v. *Neville*, cited in *Buxton* v. *Lister* (1746) 3 Atk. 383, Lord HARDWICKE ordered specific performance of an installment contract for the sale of 800 tons of iron. That case, without any modern decisions in support however, has been cited and defended as law. Pomeroy, Cont. (2d ed.) § 15; Story Eq. Juris. (13th ed) § 718. But it has been criticised. *Pollard* v. *Clayton* (1855) 1 K. & J. 462; Fry on Spec. Perf. (3d ed.) § 67. Inadequacy of legal remedy consists in inadequacy of money as compensation, and not in the difficulty of estimating the amount. The negative covenant does not increase the jurisdiction of equity. The court rests also on the fact that the subject-matter of the contract is identified; but clearly that is not enough.

EVIDENCE—RECORDS OF BOARD OF HEALTH. In an action on a life insurance policy, in order to impeach statements made in the application for the policy, the records of the board of health of a city, kept pursuant to the requirements of a general public health law of a State, were offered in evidence. *Held*, they were inadmissible. *Beglin* v. *Metropolitan Life Insurance Co.* (1903) 173 N. Y. 374.

To constitute a register a public document, within the common law rule of evidence making public records admissible, it must not only be kept pursuant to legal mandate but it must be open to the general public for inspection, verification and if need be contradiction. These circumstances give it credibility. *Sturla* v. *Freccia* (1880) L. R. 5 App. Cas. 623; *Evanston* v. *Gunn* (1878) 99 U. S. 660, 666. They did not appear in the case under discussion, the statute in question being a police regulation. *Davis* v. *Supreme Lodge* (1900) 165 N. Y. 159. The fact that the statute provided in terms that the records should be *prima facie* evidence of the facts therein stated does not warrant the presumption that the legislature intended to change the common law rule in private controversies. *Plank Road Co.* v. *Harrison* (1854) 16 Ill. 81.

INSOLVENCY—FRAUDULENT CONVEYANCE—IMPROVEMENTS ON WIFE'S LAND. C., in building a house on his wife's land, contracted with H. for materials. When the contract was made, C. was solvent, but the court found it a reasonable conclusion for the circumstances that he must have gone ahead knowing that the work would render him insolvent. Though the wife knew of the transaction she did not disclose her ownership until the improvements were completed. C. became insolvent. *Held*, H. could charge the land by creditor's bill with the value of the improvements. *Brand* v. *Connery* (Mich. 1902) 92 N. W. 784.

As gratuitous improvements on another's land are treated as gifts, the case is within the general principle that a voluntary conveyance which deprives a debtor of the means of paying his debts is void as to creditors, regardless of the moral character of the debtor's motive. Bump on Fraudulent Conveyances, § 253. Even though the wife took no active part in the transaction she could not take the benefit of it as against the defrauded creditor, *Hitchcock* v. *Kiely* (1874) 41 Conn. 611; and permanent improvements on her land may be reached by creditor's bill. *Humphrey* v. *Spencer* (1892) 36 W. Va. 11; *contra*, *McFerrin* v. *Carter* (Tenn. 1874) 3 Baxt. 335.

INSURANCE—BLANKET AND SPECIFIC POLICIES—PRORATING LOSS. Property consisting of several items was insured under several policies, some blanket and some specific. Each policy provided that the company should not be liable for a greater proportion of the loss than that which the amount of the policy bore to the whole insurance on the described property. Some of the items only were destroyed. *Held*, to find this proportion on the first item, the whole amount of the blanket insurance was to be taken, and on the succeeding items such amount less the liability on the previous items, the items to be taken in the order of greatest loss. *Schmaelzle* v. *London & L. Fire Ins. Co. et al.* (Conn. 1903) 53 Atl. 863.

There is little authority on this question. Most of it is *contra* to the principal case, holding that the blanket should be turned into spe-

cific policies before apportioning the loss. None of the courts, however, give any reason for this position. *Blake* v. *Ins. Co.* (Mass. 1858) 12 Gray 265; *Chandler* v. *Ins. Co.* (1898) 70 Vt. 562; *Lesure Co.* v. *Ins. Co.* (1897) 101 Ia. 514. But by the terms of a blanket policy the full amount attaches to each item, and therefore the doctrine of the principal case, and of those in accord, basing the decisions upon the terms of the contract, seems the sounder view. *Page* v. *Sun Ins. Co.* (1896) 74 Fed. 203.

INSURANCE — MARINE—CONSTRUCTIVE TOTAL LOSS. A policy of marine insurance provided that memorandum articles should be free of particular average and that there could be no abandonment. The cargo, memorandum articles, sank. Part was recovered in a damaged condition and sold, but the amount realized was less than the cost of recovery. *Held*, there was a constructive total loss and the insurers were liable. *Devitt* v. *Ins. Co.* (1902) 173 N. Y. 17.

Authorities are conflicting as to whether, in the case of memorandum articles free from particular average, a constructive total loss will render the insurers liable or whether there must be an actual total loss. The weight of authority is in conflict with the doctrine of the principal case. *Washburn Co.* v. *Ins Co.* (1900) 179 U. S. 1; *Williams* v. *Ins. Co.* (1850) 31 Me. 455; *Gould* v. *Ins. Co.* (1868) 20 La. Ann. 259. The same rule as laid down in *Murray* v. *Hatch* (1810) 6 Mass. 465, does not appear to be changed by the cases cited in the principal case. Furthermore, to have a constructive total loss abandonment or notice of abandonment is necessary. Arn. Ins. § 1091; *Kaltenbach* v. *Mackenzie* (1878) 3 C. P. D. 467. Hence the clause providing that there could be no abandonment would seem to show that the intention of the parties was for the insurers to be liable for an actual total loss only.

INSURANCE—LEGAL EXECUTION OF INSURED. The insured in a policy of life insurance was legally executed. *Held*, the beneficiaries could not recover the amount of the policy. *Burt* v. *Union Central Life Ins. Co.* (1902) 187 U. S. 362.

A policy providing expressly that a sum of money shall be paid to the beneficiary or to the insured's estate in case the insured is legally executed would be, as to that condition at least, void as against public policy; and therefore if the law will not permit such an express contract it clearly cannot allow recovery on an implied one to the same effect. *Ritter* v. *Mutual Life Ins. Co.* (1898) 169 U. S. 139; *Hatch* v. *Same* (1876) 120 Mass. 550. The law in England is the same. *Amicable Society* v. *Bolland* (1830) 4 Bligh N. R. 194. But a different result would be more logical in jurisdictions where in the absence of an express provision the suicide of the insured is no defence. *Fitch* v. *Am. Pop. Life Ins. Co.* (1875) 59 N. Y. 557; *Kerr* v. *Minn. Mut. Ben. Ass'n* (1888) 39 Minn. 174.

LANDLORD AND TENANT—DUTY TO REPAIR—INJURY TO THIRD PARTY. Plaintiff was injured by falling through a decayed platform leading from a railroad station to a hotel. Defendant, the lessor of the premises, had covenanted to make outside repairs, and there was evidence that he knew of the defect and that it existed at the time the lease was made. *Held*, the defendant's liability as owner for defects in his premises was not extinguished by the lease but was continued by his covenant to repair. *May* v. *Ennis* (1903) 79 N. Y. Supp. 896.

The rule is so laid down in numerous *dicta* and some decisions. Shearm. and Redf. on Negl. § 708; *Nelson* v. *Liverpool Brewing Co.* (1877) 2 C. P. D. 311; *Moore* v. *Steljes* (1895) 69 Fed. 518. This is sometimes put on the anomalous ground that circuity of action is thereby avoided. *Payne* v. *Roger* (1794) 2 H. Bl. 350; *City of Lowell* v. *Spaulding* (1849) 4 Cush. 277. The principal case takes the position, which also however, seems questionable, that the owner has retained such effective control of the premises as to keep him under a duty to the public to prevent injury through their disrepair. It is in accord with a *dictum* in *Edwards*

v. *N. Y. & H. R. R.* (1885) 98 N. Y. 245, but ignores the distinction that the defect must amount to a nuisance made in *Steiger* v. *Van Sicklen* (1892) 132 N. Y. 499 and *Folsom* v. *Parker* (1900) 31 Misc. 348. *Burdick* v. *Cheadle* (1875) 26 Ohio St. 393, and *Mehr* v. *McNab* (1894) 24 Ont. 657 narrow the rule by holding that the plaintiff, to recover, must be in the position of a stranger to the occupier.

NEGOTIABLE INSTRUMENTS—CHECKS—REVOCATION BY DEATH. The defendant bank paid a check after notice of the death of the drawer. *Held*, the bank was liable to the drawer's estate. *Pullen* v. *Placer Co. Bank* (Cal. 1902) 71 Pac. 83.

Cases on the point are few because the bank ordinarily would refuse to pay, but the decision follows the trend of authority. *Fordred* v. *Seamen's Savings Bank* (N. Y. 1871) 10 Abb. Pr. N. S. 425; *dicta* in *Second National Bank* v. *Williams* (1865) 13 Mich. 282; *National Commercial Bank* v. *Miller* (1884) 77 Ala. 168; *Weiand's Adm'r* v. *State Nat. Bank* (Ky. 1901) 65 S. W. 617. In jurisdictions where a check operates as an assignment as soon as delivered a different result would be reached; *Lewis* v. *International Bank* (1883) 13 Mo. App. 202; and also where it is treated as a designation under the drawer's contract with the bank which gives the holder an indefeasible right to sue. *Roberts* v. *Austin* (1868) 26 Ia. 315. Elsewhere the holder of an uncertified check is properly held to have no claim against the bank. On the death of the drawer his personal representative gets the title to the deposit. On principle it would seem that he alone could give a valid order to pay. Where the bank pays without notice of the death of the drawer its protection no doubt demands a relaxation of the logical rule, but where it has notice this necessity does not exist. See 2 COLUMBIA LAW REVIEW, 171.

NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR. Between the drawing and maturity of a bill of exchange the drawer made an assignment for the benefit of creditors. The bill being dishonored, notice of dishonor was sent to the drawer but not to his assignee. *Held*, notice to the drawer alone was sufficient. *Moreland's Adm'r* v. *Citizens Sav. Bank* (Ky. 1903) 71 S. W. 520.

That notice to the assignee alone was sufficient was decided in *Callahan* v. *Bank of Kentucky* (1884) 82 Ky. 231, so that the rule in Kentucky is now the same as that laid down in § 172 of the Negotiable Instrument's Law, viz. that notice may be given either to the party or to his assignee. The point has seldom come before the courts. The text writers take various views. 1 Pars. Notes & B. (2nd ed.) 500; Daniel, Neg. Paper § 1002.

PLEADING AND PRACTICE—APPELLATE JURISDICTION OF U. S. SUPREME COURT. The jurisdiction of a circuit court of the United States was invoked solely on the ground of diverse citizenship. *Held*, though in the conduct of the case a federal question might have arisen, no appeal lay from the judgment of the Circuit Court of Appeals to the Supreme Court under sec. 5 & 6 of the Judiciary Act of 1891 (26 Stat. at L. 826, chap. 517). *Ayers* v. *Polsdorfer* (1903) 23 Sup. Ct. Rep. 196.

The decision defines the right of appeal in the two classes of cases which may arise where jurisdiction is invoked because of diverse citizenship. In those where constitutional questions are also involved, or prize cases or cases involving treaties, the privileges of appeal to the Supreme Court or to the Circuit Court of Appeals are mutually exclusive. In those where diversity of citizenship alone gives jurisdiction appeal must be made to the Circuit Court of Appeals. These conclusions result from previous holdings. *Colorado Central Mining Co.* v. *Turck* (1893) 150 U. S. 138; *Loeb* v. *Columbia Twp.* (1900) 179 U. S. 472. In the principal case the motion for certiorari permitted by sec. 6 of the act of 1891 was denied on the ground of laches.

PLEADING AND PRACTICE—RIGHT TO SUE IN FORMA PAUPERIS. Plaintiff had made a contract with her attorney to prosecute her case on a contingent fee. She then sought to sue as a poor person. *Held*, she could not,

for she was suing not only in her own interest but as trustee for the attorney, and it was not shown that he came within the statute. *Feil* v. *Wabash Ry. Co.* (C. C., E. D. Mo. 1902) 119 Fed. 490.

In New York under a similar state of facts the same result was reached in *Cahill* v. *Manhattan R. Co.* (1899) 38 App. Div. 314. And it appears to be the custom of the courts to construe these statutes strictly against the applicant. *Moore* v. *Cooley* (N. Y. 1842) 2 Hill 412. Thus it is held that an administrator cannot sue *in forma pauperis* though the estate is insolvent. *McKiel* v. *Cutler* (N. C. 1853) Busbee's Eq. 139; *Smith* v. *Ry.* (1891) 89 Tenn. 664; but see *contra*, *C. & P. Coal Co.* v. *Britton* (1896) 3 Kan. App. 292. Nor can the committee of a lunatic so sue, *Bechtle* v. *Ry.* (N. Y. 1894) 31 Abb. N. C. 483, nor an assignee in bankruptcy. *Osborne* v. *Henry* (1872) 66 N. C. 354.

REAL PROPERTY—ADVERSE POSSESSION—INTENTION TO HOLD. Adjoining property owners constructed and maintained a fence for more than twenty years upon the line of a previous fence, in the belief that it marked the true boundary between their lands. A survey revealed that the fence was not upon the boundary shown by the deeds. The property owner on whose land the fence was built brought an action of ejectment. *Held*, the occupant had gained title by adverse possession. *Lawrence* v. *Washburn* (Ia. 1903) 93 N. W. 73.

The decision is at variance with that rendered in *Grube* v. *Wells* (1871) 34 Ia. 148 on the question of the intent necessary to create a person a disseisor. The principal case holds that the belief of the occupant that the visible boundary and the boundary mentioned in the deed are identical, is sufficient to create him a disseisor, while *Grube* v. *Wells* held that coupled with such belief there must be an intention to hold the land in any event. The latter doctrine prevailed at one time in several jurisdictions; *Brown* v. *Gay* (Me. 1824) 3 Greenl. 126; *Brown* v. *Cockerell* (1858) 33 Ala. 38; but these cases have been restricted within very narrow limits by later adjudications in the same courts. *Alexander* v. *Wheeler* (1881) 69 Ala. 332; *Hitchings* v. *Morrison* (1881) 72 Me. 331.

REAL PROPERTY—CONVEYANCE DEED DELIVERED TO THIRD PERSON FOR GRANTEE NOT IN ESSE. Plaintiff corporation claimed title to mining land under a deed executed in its favor by the original locators before plaintiff was incorporated, delivered to a promoter of the proposed corporation, and by him delivered to plaintiff after incorporation. Defendant objected to the admission of this deed in evidence. *Held*, plaintiff was entitled to submit the deed as *prima facie* evidence of title. *Santaquin Mining Co.* v. *High Roller Mining Co.* (Utah, 1903) 71 Pac. 77. See NOTES, p. 276.

REAL PROPERTY—LATERAL SUPPORT—NEGLIGENCE IN EXCAVATING—NOTICE. Defendant failed to notify the owner of the adjacent lot of his intention to excavate his own land. As a result of the excavation plaintiff's house was injured. *Held*, the failure to give notice amounted to negligence and rendered defendant liable for the injury to the house. *Davis* v. *Summerfield* (N. C. 1902) 42 S. E. 818. See NOTES, p. 274.

STATUTES—PUBLIC POLICY—CONSENT OF PROPERTY OWNERS. By statute the consent of property owners within fifty feet of a proposed saloon was made a condition precedent to the granting of a license for the establishment of the saloon. The plaintiff sold his consent. *Held*, the sale was void as against public policy. *Greer* v. *Severson* (1903) 93 N. W. 72.

By statute the consent of a majority in interest of the property owners on a proposed street railway route was made a condition precedent to the granting of a franchise. The plaintiff in error purchased such consent. *Held*, the sale was not against public policy. *Hamilton G. & C. Traction Co.* v. *Parish* (Ohio, 1902) 65 N. E. 1011.

The general rule is that where the consent required is to an undertaking directly affecting the public it is not a proper subject of sale. *Howard* v. *First Independent Church of Baltimore* (1862) 18 Md. 451;

Doane v. *Chicago City R. R.* (1896) 160 Ill. 22; *Smith* v. *Applegate* (1852) 23 N. J. L. 352. These cases proceed upon the theory that the function of such consent is to instruct those who are to authorize the proposed undertaking in order that they may not act contrary to the public interest. The error in the second case stated is that it treats the consent of the individual property owner solely as a weapon to be used for protection against pecuniary damage. The first case is rightly decided.

TAXATION—CONSTITUTIONAL LAW—NEW YORK SPECIAL FRANCHISE TAX. N. Y. Laws 1899, c. 712, added to the subjects of taxation specified in the N. Y. Tax Law the franchise or right to construct, maintain or operate railroads, telegraph lines, etc., over or under streets or public places of any municipality. It provides that the value of the franchise and the value of the tangible property operated thereunder shall be assessed together, under the designation of a "special franchise," by the State Board of Tax Commissioners. The assessment is then to be reported to the local assessor to be placed on his roll. *Held*, the act is in violation of the home rule provision (Art. X. Sec. 2) of the New York Constitution. *People ex rel. Metropolitan Street R. Co.* v. *State Board of Tax Commissioners* (1903) 80 N. Y. Supp. 85. See NOTES, p. 267.

TORTS—MALPRACTICE—STATUTE OF LIMITATIONS. Defendant, a physician, operated on plaintiff for appendicitis. When he sewed up the incision he negligently left therein a cheese-cloth sponge. The wound did not heal, and defendant treated and advised plaintiff for about a year, when he abandoned the case. To an action brought eight months after such abandonment defendant pleaded the statute providing that an action for malpractice "can only be brought within one year after the cause of action accrues." *Held*, the cause of action was not barred. *Gillette* v. *Tucker* (Ohio, 1902) 65 N. E. 865.

The court was evenly divided, the dissenting view being that the cause of action accrued when the defendant sewed up the incision without removing the sponge. But a physician who undertakes an operation assumes ordinary skill and care not only in performing the operation, but also in the subsequent necessary treatment. *Williams* v. *Gilman* (1880) 71 Me. 21. Any lack of skill and care during such subsequent treatment is malpractice, and it seems clear that for such malpractice there is a continuing cause of action during the entire period of treatment.

TRUSTS—DEVISES TO CHARITABLE USES—WHAT IS A PUBLIC CHARITY. A testator made a devise in fee in trust "to provide a home and industrial school for the orphan children of deceased Odd Fellows of the State of Kansas." *Held*, the devise did not create a public charity, the limitation to a defined class of beneficiaries being too narrow to bring it within the description of a charity; and the devise was void as in violation of the rule against perpetuities. *Troutman et al.* v. *De Boissiere, etc. School Ass'n* (Kan. 1903) 71 Pac. 286, reversing, on reargument, the same case in 64 Pac. 33. See NOTES, p. 269.